

GAO

United States General Accounting Office 128711

Report to the Chairman, Committee on
Post Office and Civil Service, House of
Representatives

December 1985

FEDERAL CIVILIAN PERSONNEL

Effects of Unconfirmed Members at the Federal Labor Relations Authority



128711

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**General Government Division
B-219908**

December 9, 1985

To The Honorable William D. Ford
Chairman, Committee on Post Office
and Civil Service
House of Representatives

Dear Mr. Chairman:

This report is in response to your July 19, 1985, request that we review certain issues relating to the Federal Labor Relations Authority (FLRA). (See app. I.) As provided by Title VII of the Civil Service Reform Act of 1978 (P.L. 95-454, 5 U.S.C. 7101-7135 [1982]), the FLRA was established to serve as an independent, neutral third party for resolving labor-management disputes in the federal sector. You asked that we (1) examine whether FLRA can perform its responsibility when its members have not been confirmed by the Senate; (2) review the role of the General Counsel; and (3) look into the FLRA caseload and case processing. As arranged with representatives of the Subcommittee on Civil Service, this report addresses the first of these three issues. The last two issues will be addressed in a later report.

The Authority currently has two of its three authorized member positions filled. Although only one of those members has been confirmed by the Senate, we believe the Authority can legally perform its statutory responsibility. However, if another vacancy occurs when one member's term expires at the end of the first session of the 99th Congress, we do not believe that the Authority will be able to issue decisions. In addition, we found that decisions on a number of cases have been delayed because of the lack of a third member. Some decisions were delayed because the two members disagreed on how the cases should be decided, and a third member was needed to cast the deciding vote. Other cases had not been voted on by the members because they were similar to these tie vote cases or involved issues the Acting Chairman and the Director for Case Management believed were so important that they required consideration by three members.

Background

The FLRA establishes policies and guidance relating to federal labor-management relations and has primary responsibility for administering Title VII of the Civil Service Reform Act. The FLRA is organized into four major case processing subunits: (1) the Authority, by law composed of the three appointed members and their staff; (2) the Office of the General Counsel (OGC); (3) the Office of Administrative Law Judges; and (4)

the Federal Service Impasses Panel. The Authority makes final decisions on differences between parties in the collective bargaining process. The OGC supervises the FLRA regional offices, investigates and prosecutes unfair labor practice (ULP) matters, and is responsible for issues regarding the representation of federal employees. The Office of Administrative Law Judges conducts hearings and prepares decisions in ULP cases. The Federal Service Impasses Panel assists federal agencies and unions representing federal employees in resolving impasses which arise in labor negotiations.

Objective, Scope, and Methodology

The objective of this review was to determine the legal and administrative effects of the lack of confirmed members at the FLRA. We conducted our work between August 19 and October 30, 1985, at the Washington, D.C., headquarters of the FLRA. In conducting this review we interviewed officials responsible for agency operations, including the Acting Chairman, the other Member of the Authority, and the Director for Case Management. We also reviewed the FLRA's authorizing legislation and its history, agency annual reports, and available case processing data. As requested by your office, we did not obtain official agency comments but did discuss the report with FLRA members and other agency officials. We incorporated their technical corrections. Our review was done in accordance with generally accepted government auditing standards.

Lack of Full Confirmed Membership Does Not Affect Authority's Legal Standing

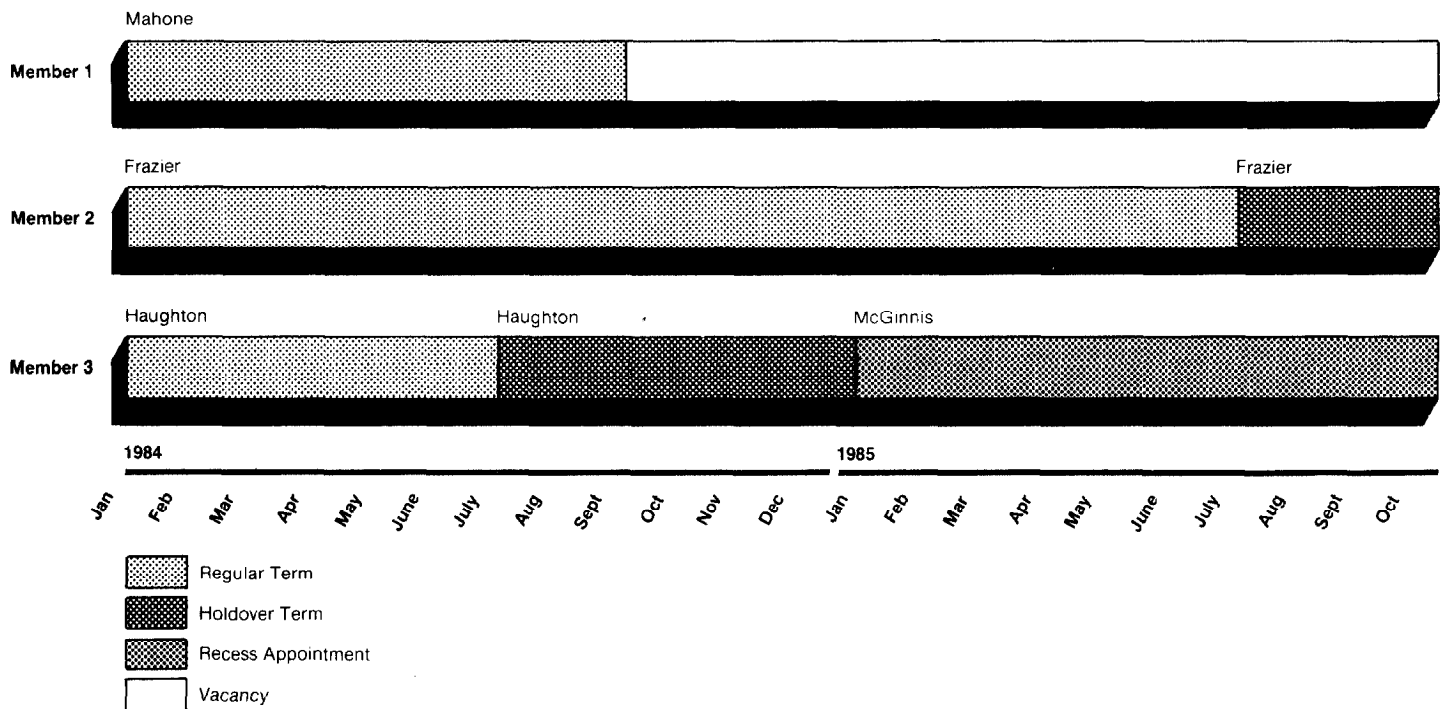
Section 7104(a) of Title 5, United States Code, provides that the Authority is to be composed of three members appointed by the President with the advice and consent of the Senate. According to Section 7104(c), members are appointed for a term of 5 years, with terms not expiring before the earlier of (1) the date on which the member's successor takes office¹ or (2) the last day of the Congress beginning after the date on which the member's term of office would expire. Section 7104(d) of the statute specifies that a "vacancy in the Authority shall not impair the right of the remaining members to exercise all of the powers of the Authority."

The Authority is currently composed of two members—Acting Chairman Henry B. Frazier III and Member William J. McGinnis, Jr. The third member position has been vacant since August 31, 1984, when Chairman Barbara J. Mahone resigned. Her resignation left two members—Mr. Frazier and Ronald W. Haughton. Mr. Haughton's term would have

¹Members may be reappointed and therefore succeed themselves.

expired July 1, 1984, but he continued to serve as a member until December 28, 1984, pursuant to the holdover provision of Section 7104(c) of the agency's enabling statute. Mr. Frazier was designated Acting Chairman by President Reagan on September 1, 1984. Mr. McGinnis was appointed by President Reagan during the Congressional recess in December 1984 and was sworn in as Mr. Haughton's replacement on December 28, 1984, without Senate confirmation. Former Chairman Mahone's position on the Authority remains vacant. (See Figure 1.)

Figure 1: Changes in Authority Membership, 1984-1985



On October 21, 1985, President Reagan nominated Jerry Lee Calhoun to fill former Chairman Mahone's unexpired term and resubmitted the nomination of William J. McGinnis, Jr. to fill the position of former Member Haughton. However, as of the date of this report, the Senate has not confirmed those nominations.

Because his term would have expired July 1, 1985, during the 99th Congress, Acting Chairman Frazier may continue to serve pursuant to the holdover provision of 5 U.S.C. 7104(c) until the last day of the 100th Congress or until his successor takes office, whichever comes first. Member McGinnis was appointed in December 1984 during the recess

between the adjourning of the second session of the 98th Congress and the convening of the first session of the 99th Congress. Article II, Section 2, Clause 3 of the Constitution permits the President to make such recess appointments and the appointees to serve without Senate confirmation until the end of the following session of Congress. Member McGinnis is, therefore, empowered to perform the functions of a member of the Authority until the end of the first session of the 99th Congress, expected before the end of calendar year 1985. Thus, both Acting Chairman Frazier and Member McGinnis currently serve as legal members of the Authority.

Furthermore, the agency's enabling statute and common law indicate that a vacancy in the Authority does not affect the legal ability of the FLRA to carry out its responsibility. As stated above, Section 7104(d) of the statute specifies that a "vacancy in the Authority shall not impair the right of the remaining members to exercise all of the powers of the Authority." Common law generally recognizes that a collective body is empowered to act if a quorum consisting of a majority is present. (See FTC v. Flotill Products, 389 U.S. 179, 183 (1967).) Therefore, since the two members of the Authority currently serve legally and the law allows the agency to operate with only two members, the lack of a third member of the Authority does not affect the legal ability of the FLRA to perform its statutory responsibility.

However, should another member position become vacant when Member McGinnis' recess appointment expires at the end of the first session of the 99th Congress, the Authority could not legally perform its responsibility. In the absence of additional statutory authority, the Authority would not be able to issue decisions with only one legal member. Another member position will become vacant unless the Senate confirms one of the nominations before it or unless the President makes another recess appointment.

Lack of Third Member Has Delayed Case Processing

While the Authority can legally perform its statutory responsibilities with only two members, the absence of a third member has delayed decisionmaking on a number of ULP, representation, arbitration, and negotiability cases within the Authority. In ULP cases, individual employees, unions, or agencies file charges in OGC regional offices alleging that government agencies or labor organizations have committed unfair labor practices in violation of Title VII of the Civil Service Reform Act. If the OGC determines the charge has merit and issues a complaint, absent settlement, a hearing may be heard before an Administrative

Law Judge (ALJ) or the case may be sent directly to the Authority for a decision. Recommended decisions by ALJs may be appealed to the Authority. Representation petitions are requests filed with regional OGC offices by employees, unions, or agencies to resolve issues involving exclusive representation by a labor organization. Representation decisions and orders issued by regional directors may be appealed to the Authority. Exceptions to arbitration awards may be filed by either unions or agencies for a decision by the Authority. Negotiability appeals may be made to the Authority by employee unions in disputes with agencies over what matters can be collectively bargained.

To monitor the progress of cases through the adjudicatory process, the Authority has established a case tracking system which indicates the date each case has reached a significant point in the process. The tracking system contains 16 steps, ranging from the date the case is received at FLRA headquarters (step 1) to the date the case is decided by the Authority (step 16). The Director for Case Management receives periodic reports on each case indicating, among other things, the date the case was received at headquarters and the date the case moved to its latest step in the process.

During fiscal year 1985, the Authority closed 822 cases, the highest number in any fiscal year in the agency's history. However, of the 499 cases in the case tracking system as of August 22, 1985, 127 (25 percent) were in abeyance because of the lack of a third member. These cases were in three general categories: (1) 15 cases held because of a tie vote between the two Authority members and needing a third member to cast the deciding vote; (2) 23 cases not forwarded to the members because of earlier tie votes in similar cases; and (3) 89 cases not forwarded to the members because they involved issues the Acting Chairman and the Director for Case Management believed so important that they required the attention of three Authority members.² Table 1 illustrates the number of cases in each general category by case type and the average age of these cases as of August 22, 1985, since receipt and since movement to their latest step.

²Although the Acting Chairman and the Director for Case Management believed these 89 cases should await a full complement of members, Member McGinnis told us he was unaware these cases were in abeyance for this reason and did not believe they should be delayed. According to the Acting Chairman and the Director for Case Management, the reason for these cases being in abeyance was common knowledge within the agency. Thus, although all parties knew these cases were in abeyance, there is disagreement as to the reason for their delay.

Table 1: Authority Cases in Abeyance Due to Lack of Third Member August 22, 1985

	Number of Cases in Abeyance by Case Type					Average Age of Cases (Days) Since	
	Representation	Negotiability	Arbitration	ULP	Total	Receipt	Latest Step
Tie Vote	—	12	—	3	15	940	46
Tie Vote in Similar Case—Not Forwarded	—	22	1	—	23	863	155
Important Issue — Not Forwarded							
Management Rights	—	43	—	2	45	784	225
Funds for Collective Bargaining	—	22	8	9	39	581	193
Contracting Out	—	—	5	—	5	660	3
Total	—	65	13	11	89	688	199
Total	—	99	14	14	127	750	173

Of the decisions delayed by a tie vote between the two members, 12 were negotiability appeals and most of these concerned the nature and extent of an agency's bargaining obligations over proposals concerning pay and money-related fringe benefits. The cases ranged in age from 160 to 1,241 days since being received at national headquarters, with an average of 940 days since step 1 and 46 days since advancing to the most recent step. The cases not forwarded to the members because of a tie vote in a similar case were all negotiability cases except for one arbitration case, and most involved the pay and money-related fringe benefits issue. They ranged in age from 162 to 1,694 days since step 1, with an average of 863 days since the case was received and 155 days since the most recent step.

The 89 cases delayed because the Acting Chairman and the Director for Case Management believed they involved issues requiring a vote by the full Authority concerned three general types of issues:

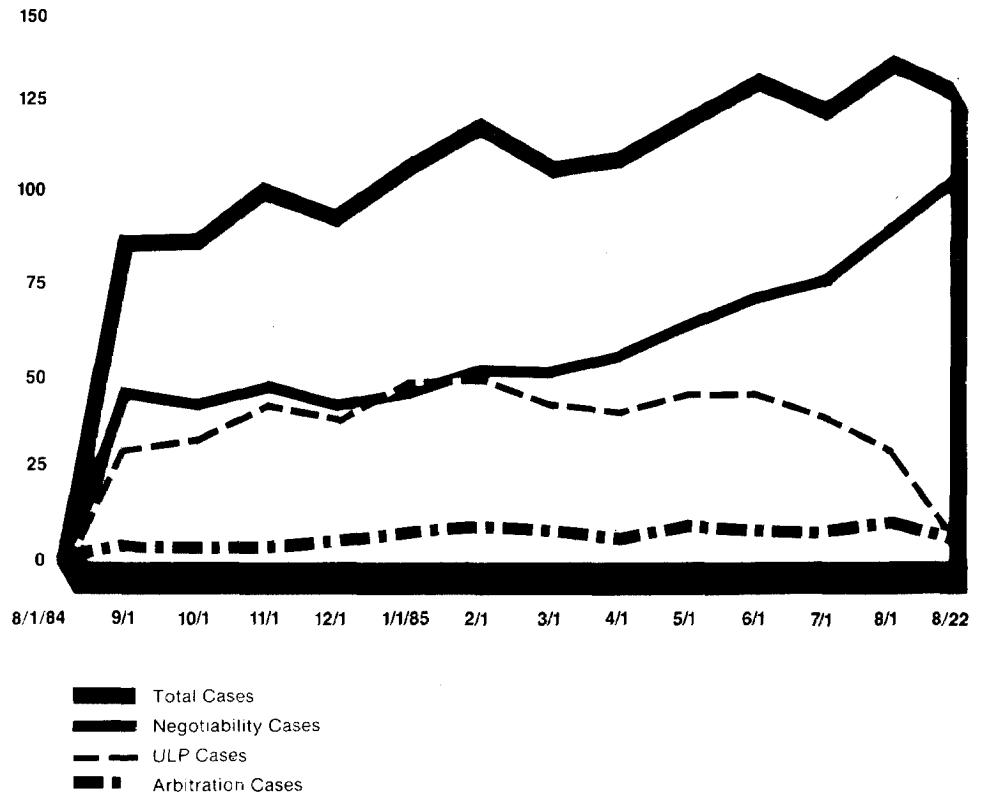
- In 45 cases (43 negotiability appeals and 2 ULP cases), the issues related to the nature and extent of the employer's obligation to bargain over proposals concerning employees adversely affected by the exercise of management rights.
- In 39 cases (22 negotiability appeals, 8 exceptions to arbitration awards, and 9 ULP cases), the issues concerned whether and to what extent a labor organization may bargain over matters relating to expenditures of funds for collective bargaining.

-
- In 5 exceptions to arbitration awards, the issues involved the standards to govern the review of awards issued by grievance arbitrators in cases resulting from challenges to procurement awards.

For some of the issues central to the 89 cases, the Authority has been attempting since June 1985, to identify a representative or "lead" case to adjudicate. Once lead cases have been identified and resolved, the Director for Case Management said the remaining cases will be sent to the members for resolution.

Figure 2 illustrates the changes in the number of cases in abeyance because of the lack of a third member by case type and in total from August 1, 1984, to August 22, 1985. The rapid increase in such cases from August 1, 1984, to September 1, 1984, was caused by a shift in categories after Chairman Mahone's resignation on August 31, 1984. Before then, many of these cases were held for a variety of reasons not associated with the lack of a third member, such as awaiting a court decision in a related case. Since then, however, the Director for Case Management said the Authority considers them to be in abeyance due to the lack of a third member, even if the original reason for inaction had been resolved. Of the total number of cases in abeyance due to the lack of a third member, the predominant increase was in the number of negotiability cases. The rise was particularly acute in July and August 1985, when negotiability cases in abeyance because of a lack of a third member increased from 75 on July 1, to 101 on August 22. ULP cases, on the other hand, declined from 34 on September 1, 1984, to 11 on August 22, 1985.

Figure 2: Cases in Abeyance Due to the Lack of a Third Member by Case Type and Total (8/1/84 to 8/22/85)



As arranged with your office, we will send copies of this report to interested parties and make copies available to others on request.

Sincerely yours,

W. J. Anderson

William J. Anderson
Director

Letters Requesting the Study

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House of Representatives
Committee on Post Office
and Civil Service
Washington, DC 20515

TELEPHONE (202) 225-4054

July 19, 1985

Honorable Charles A. Bowsher
Comptroller General of the
United States
General Accounting Office
Washington, D. C. 20548

Dear Mr. Bowsher:

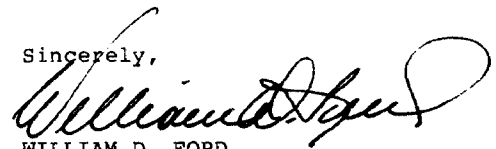
Enclosed are copies of letters I have received from Representative Patricia Schroeder, Chairwoman of the Subcommittee on Civil Service, requesting reviews of certain issues relating to the Office of Personnel Management and the Federal Labor Relations Authority.

I would appreciate your reviewing the issues described in the enclosed correspondence and providing the Committee with your findings. Should you have any questions concerning this request, please contact Andrew Feinstein of the Subcommittee staff on 225-4025.

Your assistance in providing this information is appreciated.

With kind regards,

Sincerely,



WILLIAM D. FORD
Chairman

Enclosures

WDF:rlp

Appendix I
Letters Requesting the Study

NINETY-NINTH CONGRESS

PATRICIA SCHROEDER, COLORADO, CHAIRWOMAN
GERRY SIKORSKI, MINNESOTA CHARLES PASHAYAN, JR., CALIFORNIA
MERVYN M. DYMALLY, CALIFORNIA FRANK HORTON, NEW YORK

U.S. House of Representatives
COMMITTEE ON POST OFFICE AND CIVIL SERVICE
SUBCOMMITTEE ON CIVIL SERVICE
122 CANNON HOUSE OFFICE BUILDING
Washington, DC 20515

TELEPHONE (202) 225-4025

July 19, 1985

Honorable William D. Ford, Chairman
Committee on Post Office & Civil Service
309 Cannon House Office Building
Washington, DC 20515


Dear Mr. Chairman:

As of July 1, 1985, the Federal Labor Relations Authority (FLRA) has no members serving on terms for which they were confirmed by the Senate. The Chairmanship has been vacant since Barbara Mahone resigned on August 31, 1984. Member Henry B. Frazier III continues to serve under provisions of the law, despite the fact that his term ended on July 1, 1985. William J. McGinnis was given a recess appointment as a Member in December 1984 but the Senate has taken no action on his nomination.

The Federal Labor Relations Authority was created as part of the Civil Service Reform Act of 1978 to serve as an independent, neutral third party for resolving labor-management disputes in the Federal sector. I request that you ask the General Accounting Office to examine whether the FLRA can perform this responsibility with a lack of confirmed members. Further, GAO should review the role of the General Counsel. Finally, GAO should look into the Authority's caseload and case processing.

With kind regards,

Sincerely,


PATRICIA SCHROEDER
Chairwoman

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